In the Supreme Court of the United States

OCTOBER TERM, 1968.

No. 63.

THE STATE OF OHIO, *ex rel.* NELLIE HUNTER, ON BEHALF OF THE CITY OF AKRON,

Appellant,

vs.

EDWARD O. ERICKSON, MAYOR OF THE CITY OF AKRON, *et al.*,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF OHIO.

BRIEF FOR APPELLEES.

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COUNTER-STATEMENT OF THE CASE.

It should be mentioned that the cause proceeded in the State courts upon an amended petition (not part of the printed record) upon which no alternative Writ of Mandamus was issued.

COUNTER-STATEMENT OF QUESTIONS PRESENTED.

1. Where, after institution of litigation in a State Court, upon a Petition in Mandamus, to compel a Fair Housing Commission (established by certain municipal Fair Housing ordinances) to hear a complaint, there is enacted not only a comprehensive Federal Fair Housing Act but also a State Fair Housing Code; and where during the pendency of such litigation before this Court, it is determined that Section 1982 of Title 42 U. S. C. applies to

racial discrimination in all forms of housing, does not such litigation thus thereby become moot?

2. Does an amendment to a City Charter which requires that all fair housing litigation enacted by City Council be first approved by the electors before such litigation shall become effective, constitute invidious state action as prohibited by the 14th amendment?

ARGUMENT.

I.

THIS LITIGATION IS NOW MOOT.

The Appellant filed her original petition for Writ of Mandamus in the State Court on February 3, 1965. (App. 1.) In Ohio Mandamus is treated as an extraordinary legal remedy granted only in those cases where relief cannot be otherwise obtained. Had the action been filed after October 30, 1965, the Ohio courts would most likely have found her not entitled to the relief of Mandamus since adequate legal remedy was then available.

Effective October 30, 1965, Chapter 4112 of Title 41, Ohio Revised Code was amended to make unlawful certain discriminatory practices relating to the lease, rental, financing and sale of commercial and residential property and to provide the Ohio Civil Rights Commission with enforcement powers. (App. A, this Brief.)

The complaint of the Appellant, and of those similarly situated, as alleged in her petition, were complaints relating to the conduct of real estate agents and as such, are not within the purview of Section 1982, Title 42 U. S. C. Consequently, there is no conflict between amendment 137 and Section 1982 with respect to the matters presented to this Court under this litigation. (See App. B, this Brief and original record.)

The 90th Congress of the United States passed a Federal Civil Rights Act known as Public Law 90-284, which was signed by the President of the United States on April 11, 1968, and which provides for Fair Housing throughout the United States. The act, among other things, permits the aggrieved party to sue for actual and punitive damages and gives the Attorney General of the United States certain powers of enforcement.

On June 17, 1968, this Court held that Section 1982 of Title 42 U. S. C. prohibited private as well as public racial discrimination in the sale and rental of any and all housing in this country. So with two federal and one state law prohibiting housing discrimination only the parties, including Appellant who now resides beyond the State of Ohio, are concerned with this litigation which no longer requires the resolution of principles, the settlement of which is important to the public. It cannot be fairly said that the right to discriminate in Akron is immune from legislative, executive, or judicial regulation at that level of government. We urge this Court to return to its practice of not passing upon moot questions. See *Price vs. Sioux City Cemetery*, 349 U. S. 7.

II.

AKRON CHARTER AMENDMENT 137 DOES NOT CONSTITUTE SIGNIFICANT POSITIVE STATE ACTION.

Akron is not required to have fair housing legislation. Private invasion of individual rights is not the subject matter of the equal protection clause. *Civil Rights Cases*, 109 U. S. 3. The action prohibited by the equal protection clause of the Fourteenth Amendment is only such action as may fairly be said to be that of states or any of their subdivisions. *Shelley vs. Kramer*, 334 U. S. 1161.

The people of Akron by Charter Amendment 137 exercise the right to vote on Fair Housing, indicating in this sense they have taken state action, but such action is a far cry from any of the situations where this Court has found official involvement in invidious racial discrimination. It must also be not forgotten that this action did not repeal fair housing ordinances 873 and 926. A fair assessment of the potential impact of the political action of the citizens of Akron must lead only to the conclusion that such action was neither intended to authorize, nor does it authorize, private racial discrimination. *Reitman vs. Mulkey*, 387 U. S. 369.

When one considers the circumstances and conditions under which the amendment 137 was approved are considered, it becomes apparent that its immediate objective was to provide the citizens with an opportunity to pass upon fair housing legislation which the City Council had enacted as emergency measures. The record reveals that the fair housing ordinances were passed as emergency ordinances (App. 5 and 14). The record also reveals that the Charter Amendment petitions were filed with the clerk on August 25, 1964, the same being nearly 37 days after the first ordinance was enacted and 33 days after the amended ordinance was approved (App. 24).

No evidence on Appellant's complaint was adduced in the Court and no finding of fact was ever made thereon. The petitions to amend the charter came so soon after the ordinances were enacted that the Fair Housing Commission provided thereunder neither organized nor heard any complaints. Appellant's complaint was not filed until 187 days after Ordinance No. 873 was passed and after 80 days following the vote on the Charter Amendment (App. 24).

The Charter and State Law prohibits a referendum on emergency ordinances. When the people desire to have a vote on ordinances passed as emergency measures, they must either initiate a repeal petition or secure a charter amendment.

Whereas, the California Proposition 14 declares that no law shall be passed denying a person the right to decline to sell to such person as he chooses, Akron Charter Amendment 137 merely grants the people the right to vote on whatever Fair Housing legislation is enacted by the City Council. With the former, the ultimate impact is the potential for authorizing private racial discrimination, while the essential impact and thrust of the latter is to establish an atmosphere and environment of neutrality. The Chapter 137 action is no sweeping prohibition saying that nothing may be done concerning fair housing. This action does not make racial discrimination in housing lawful. This action does not repeal the ordinances (App. 50, para. 5).

As things stand today in Akron, the Council may order Ordinance No. 873 and 926 placed on the ballot at any time. Moreover, Council may also propose an amendment to the Charter for a repeal of Section 137, both of which procedures require no effort or place no burden upon the Appellant except, of course, that the matter is subject to the basic democratic process of majority rule—the accepted formula for structuring local governmental units.

Had Council chosen to pass these ordinances not as emergency legislation, then the right of repeal by referendum would have been available to the citizens of Akron, and we most likely would not be involved with this litigation, because a vote upholding the ordinances would end the challenge, while a repeal vote in all probability would

discourage Council from repeating the process. We have been unable to find any decisions of this Court which would indicate that a repealer would violate the Fourteenth Amendment.

Amendment 137 on the one hand makes it unnecessary to either initiate a repealer every time a Fair Housing Ordinance is enacted as an emergency measure, or to obtain a referendum every time such an ordinance is enacted as general legislation. On the other hand, it obviates the necessity of the citizens initiating fair housing legislation following either a former repeal by the voters or a disinclination of City Council to enact.

Section Two (2) of Article One (I) of the Constitution of the State of Ohio provides:

> "All political power is inherent in the people. Government is instituted for their equal protection and benefit, and they have the right to alter, reform, or abolish the same, whenever they may deem it necessary; and no special privileges or immunities shall ever be granted, that may not be altered, revoked, or repealed by the General Assembly."

The Supreme Court of Ohio made absolutely no finding of state involvement. There was no fact finding which established the existence of an environment of private discrimination encouraged by positive official action.

There was no finding that the ultimate impact of the amendment would result in official encouragement of private discrimination. In the absence of facts to the contrary, it would seem that this Court would be without precedent to overrule the Supreme Court of Ohio, which rendered a unanimous decision written by its Chief Justice.

When the purpose, scope, and operative effect of Charter Amendment 137 is examined by reasonable

minds, the conclusion is inescapable that to destroy it would be a trespass on the valid legislative domain of the people of Akron. If Fair Housing legislation should become a one way street, the whole structure of constitutional guarantees to the people may well collapse. This Court has traditionally avoided imposing federal constitutional limits on the allocation of the lawmaking process within state government. See: *Highland Farm Dairy Inc. v. J. D. Agnew,* 300 U. S. 608.

III.

CHARTER AMENDMENT 137 DOES NOT CREATE AN UNCONSTITUTIONAL CLASSIFICATION.

The legislative subject was created by the ordinance, i.e., a regulation of the business of dealing in the buying, selling, leasing, financing, and rental of real property. It is not irrational to expect that the people would desire to vote on the regulation of a subject so pervasive, vast and yet so intimate in application and effect.

The Charter Amendment does not establish an invidious racial distinction as this Court found in *McLaughlin v. Florida* and in *Loving v. Virginia.*

The Appellant would have Akron accused of official invidious racial discrimination, as proscribed by the Fourteenth Amendment, because its citizens chose to have the opportunity to vote on fair housing legislation.

IV.

Appellant, in her summary of argument makes the statement that no other kind of law which the Council of the City is empowered to promulgate must first be approved by the majority of electors. Appellee urges the Court to consider 86a and 86d of the Akron Charter which sections provide that all ordinances relating to tax levies

and assessments as well as income tax ordinances must be approved by the people. (See App. 26 and original record.)

Appellant asserts that the vice of California Proposition 14 was that it made difficult the effort to succeed in obtaining open housing legislation. As we read *Reitman v. Mulkey*, 387 U. S. 369, the vice of Proposition 14 was that it was intended to authorize and did authorize racial discrimination in housing. The Charter amendment of the City of Akron in no way lends official state action to such invidious purposes.

According to *Webster's Dictionary*, invidious means "Tending to excite odium, ill will or envy; likely to give offense." The Appellees strongly deny the implication that the right of the citizens to vote on whether Akron should or should not have fair housing legislation clothes official Akron with the mantle of the stigma of discrimination. This litigation presents no such invidious facts.

CONCLUSION.

For the reasons hereinabove stated, it is respectfully submitted that the judgment of the Supreme Court of the State of Ohio is not in error and should be affirmed.

Respectfully submitted,

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